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IN THE

Supreme Court of the United States

October Term 1957 - 1958

No. 239

JOSEPH N. ROMM, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH JUDICIAL CIRCUIT

WARREN W. GRIMES,

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Supreme Court of the United States

October Term 1957

No. .....

Joseph N. Romm, *Petitioner*

v.

Commissioner of Internal Revenue, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH JUDICIAL CIRCUIT

To the Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States:

1. Joseph N. Romm respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Judicial Circuit, which affirmed and modified in part a decision of the Tax Court of the United States involving recomputation of income tax liabilities following remand.

I. OPINIONS BELOW

2. The opinions of said Court of Appeals and Tax Court have not yet been reported, but are reproduced in the appendix hereto at pages Ap. 7 and Ap. 5 respectively. The first opinion of the Tax Court is reported in 15 TCM 526; the first opinion of the Fourth Circuit,

modifying in part and otherwise affirming, is reported in 245 F.2 730.

II. JURISDICTIONAL STATEMENT

3. Jurisdiction here is invoked under 28 USC, Sec. 1254 (1); Act of June 5, 1948, c. 646; 62 Stat. 928. The decision and mandate sought to be reviewed were entered June 17, 1958.

III. QUESTIONS PRESENTED

4. (a) Did the Court of Appeals err in holding that, under its mandate for further proceedings not inconsistent with its opinion, the Tax Court could not, in recomputing the liability as required by the modifications, arrive at the correct dollar liability under the law?

(b) Did the Court of Appeals and Tax Court err in holding that a new issue was raised in the recomputation proceeding under Rule 50 of the latter court?

(c) Did the Tax Court err in basing its figures upon a first computation which petitioner agreed was in accordance with its *first* opinion, with which opinion however petitioner did not agree and which the Court of Appeals modified?

Petitioner contends all of the above questions should be answered in the affirmative.

IV. STATUTES AND RULE INVOLVED

5. (a) 26 USC Sec. 7482 *Courts of Review:*

"Jurisdiction the United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court".

(b) 26 USC Sec. 7482 (c) (1) (1954 IRC):

"Powers—Upon such review, such courts shall have power to affirm or if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require."

(c) 26 USC, Sec. 7481 (3) (b) (4) (1954 IRC):

"Rehearing—If the case is remanded by the United States Court of Appeals to the Tax Court for a rehearing, then the decision of the Tax Court rendered upon such rehearing shall become final in the same manner as though no prior decision of the Tax Court has been rendered."

(d) Rule 50, *Tax Court of the United States.*
"*Computations by Parties for Entry of Decision.*

(a) *Agreed computations*—Where the Court has filed its opinion determining the issues in a case, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the Courts determination of the issues, showing the correct amount of the deficiency or overpayment to be entered as the decision. If the parties are in agreement as to the amount of the deficiency or overpayment to be entered as the decision pursuant to the report of the Court, they or either of them shall file promptly with the Court an original and 2 copies of a computation showing the amount of the deficiency or overpayment and that there is no disagreement that the figures shown are in accordance with the report of the Court. The Court will then enter its decision.

(b) *Procedure in absence of agreement*—If, however, the parties are not in agreement as to the amount of the deficiency or overpayment to be entered as the decision in accordance with the report of the Court, either of them may file with the Court a computation of the deficiency or overpayment believed by him to be in accordance with the report

of the Court. The Clerk will serve a copy thereof upon the opposite party, will place the matter upon a motion calendar for argument in due course, and will serve notice of the argument upon both parties. If the opposite party fails to file objection, accompanied by an alternative computation, at least 5 days prior to the date of such argument, or any continuance thereof, the Court may enter decision in accordance with the computation already submitted. If in accordance with this Rule computations are submitted by the parties which differ as to the amount to be entered as the decision of the Court, the parties will be afforded an opportunity to be heard in argument thereon on the date fixed, and the Court will determine the correct deficiency or overpayment and enter its decision.

(c) *Limits on argument under this Rule.*—Any argument under this Rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the report already made, and no argument will be heard upon or consideration given to the issues or matters already disposed of by such report or of any new issues. This Rule is not to be regarded as affording an opportunity for retrial or reconsideration.

V. STATEMENT OF THE CASE

6. The income tax case was based upon the Commissioner's use of the net worth increase method. Petitioner stipulated that the use of that method was justified, but disagreed with the resultant figures, and evidence was accepted at the trial as to portions excepted to. The Petition showed the Commissioner's assertions of deficiencies and penalties by years and amounts, the answer admitted the assertions and the Tax Court's opinion found such assertions had been made—by years and amounts. The decision was entered April 30, 1956 (15 TCM 526). The Commissioner filed his computation of the liability figures under Rule 50. Petitioner agreed

such figures were correct under the then opinion and that only. The Tax Court entered its decision for such amounts. Petitioner asked review, on several grounds, by the Fourth Circuit,—Sobeloff and Soper, Circuit Judges and Hutcheson, District Judge, holding the Tax Court erred in holding petitioner's wife jointly liable, also in its allocation of two items to interest rather than to deficiency, and affirmed it otherwise. (245 F.2 730). The case was remanded for further proceedings not inconsistent with its opinion. The judgment and mandate appear in the appendix hereto, page Ap. 1. The only published report of the opinion appears in 57 US Tax Cases (CCH) decision 9757, page 57,773. The decision was issued May 27, 1957.

7. Thereafter (July, 1957) the Commissioner published a new ruling (57-332, IRB 1957, 29-8), revoking and reversing an earlier ruling and acquiescing in the principle of the decisions in *Stern Bros. & Co.*, 16 TC 295, and *Estate of Esther M. Stein*, 25 TC 940, holding that, in computing net worth where a fraudulent return had been filed, the amounts of the deficiencies and penalties later asserted became debts of the taxpayer on the return-filing date and reduced net worth as any other debt.

8. The Commissioner on October 31, 1957, moved for entry of decision in the Tax Court under his new computation under the mandate, (Ap. 1), petitioner not being served. The Tax Court entered its decision with final liability figures as so asked. Ap. 2. Petitioner filed motion for stay, hearing, reconsideration and leave to file his own figures under Rule 50, (Ap. 3). The Tax Court vacated its decision and set petitioner's motions for hearing Ap. 5, which was had. On December 17, 1957, the Tax Court entered its final decision, (Ap. 5) holding petitioner sought a new rule 50 computation, that a new issue was raised, that the parties had agreed to the tax figures under the first Tax Court opinion and it adopted the liability figures asked by the Commissioner.

9. Petition for review by the Fourth Circuit followed (Ap. 7) and the latter court's opinion, affirming the Tax Court, was entered June 17, 1958. Ap. 7-9.

VI. REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

10. The decision below conflicts with *Hormel* v. *Helvering*, 61 S. Ct. 719; 312 U.S. 552; 85 L. Ed. 1037, headnote subjects 1, 2 and 3.

11. The decision below conflicts with instructions in *Holland* v. *U. S.*, 75 S. Ct. 127; 348 U.S. 121; 99 L. Ed. 150, on the duties of courts dealing with tax cases resting upon use of the net worth method.

12. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court—since a substantial portion, if not majority, of tax fraud cases now are based upon the net worth method. *Holland* v. *U. S. supra.*

13. The decision below is in conflict with *Davidson* v. *Commissioner* (CCA-2), 60 F.2 59, 52 (5); *Commissioner* v. *Ray*, (CCA-7) 88 F.2 891, cert. denied 57 S. Ct. 942; and *Black Motor Co.* v. *Commissioner* (CCA-6) 125 F.2 977.

14. The decision below so far departs from the accepted and usual course of judicial proceedings and sanctioned such a departure by the Tax Court as to call for an exercise of this Honorable Court's power of supervision. See *Helvering* v. *Edison Securities Corp.*, 78 F.2 85 and *Commissioner* v. *Superior Yarns Mills*, 228 F.2 736—both of the same Fourth Circuit.

VII. ARGUMENT

(a). *The mandate below did not bar a correct recomputation*

15. The computation of the dollar amount of tax liability, after the determination of issues, is the exclusive

function of the Tax Court. It is not a subject for submission to a court of appeals and was not so submitted in the first appeal. The mandate was "for further proceedings not inconsistent with the opinion." The only proceeding then in order was under Rule 50, under which, repeated in the Rule, the liability computed must be "correct". This was a matter "left open" and which a mandated court may consider and decide. *Sanford Fork & Tool Co.*; 16 S. Ct. 291; 160 U.S. 248, 256; 40 L. Ed. 414, 416. Nothing whatever was asked in the Rule 50 proceeding other than correct liability figures under the law as established by the Court decisions and formally accepted by the Commissioner. Most certainly nothing was asked "inconsistent with the opinion" of the Court of Appeals deciding the issues, for that left open the figure liability.

16. Under 26 USC, Sec. 7481 (3) (b) (4), the Tax Court's decision after mandate, including the recomputation, was to be final as though no prior decision had been rendered. The mandate's phrase "for further proceedings" clearly covered the hearing under Rule 50 asked in petitioner's motion therefor. By the Fourth Circuit's own decisions, hearings under Rule 50 include the whole proceeding down to the final decision and held it was undoubted there was power to do full justice to the parties while they were still before the Board (Tax Court). *Helvering v. Edison Securities Corp., supra.*—involving liability figure changes first raised in the recomputation proceedings.

17. Judge Sobeloff misses completely the significance of *Polizzi v. Commissioner*, (CA 6) 247 F.2 875. He uses some of the factual reasons for the Court's holding there, rather than the holding itself, which was (p. 877) that there was a failure to do justice by the Tax Court's failure to consider the new point where it was material "in the computation of the tax", and that the taxpayer's posi-

tion *could* have been allowed, even though untimely, because otherwise there would have been, as here, "a wrongful determination of the liability". That decision quotes from *Chatham Phenix Nat. Bank and Trust Co. v. Helvering*, 87 F.2 547, 550 on lower court action when necessary to meet the ends of substantial justice and where a taxpayer suffers through a wrongful determination of his tax liability. Also the quotation from *Commissioner v. Wells*, 132 F.2 405, 408, as to rules of practice and procedure being devised to promote the ends of justice. He overlooked what his own Court had done in *Helvering v. Edison Securities Corp.*, *supra* and *Commissioner v. Superior Yarns Mills*, *supra*. He also overlooked this Court's holding in *Hormel v. Helvering*, *supra*, that orderly rules of procedure do not require sacrifice of the rules of fundamental justice, and your citation of 26 USCA—1940 ed., sec. 1141 (c) (1), now 26 USCA sec. 7482 (c) (1) as to appellate courts' powers where the Tax Court's decision is not in accordance with law and "where justice may require." He disregarded your caution in *Holland v. U. S. supra*, as to courts reviewing net worth cases.

18. At no time before the Tax Court did the Commissioner claim a new issue had been raised, nor did he question the doctrine established in *Stern* and *Stein*, *supra*. His entire argument was that the wording of the mandate precluded any figure change on other than the issues modified, which is the Court of Appeals answer; but it still leaves and left "a wrongful determination of tax liability".

(b) *No new issue was raised*

19. The Tax Court held that petitioner sought a new Rule 50 computation in an argument raising new issues. Ap. 5. *Davidson v. Commissioner*, (CCA-2) *supra*, holds that new issues, *other than those relating to computation*, cannot be raised under Rule 50, citing *Great Northern Ry. Co. v. Comm.* (CCA 8) 40 F.2 872. New issues, ov-

ered by neither pleadings nor evidence, have been directed by appellate courts to be considered in a number of instances as to computations under such Rule. *Commissioner* v. *Ray*, (CCA-7) *supra; Helvering* v. *Edison Securities Co.*, (CA-4), *supra; Commissioner* v. *Central Nat. Bank of Cleveland*, (CCA-6), 119 F.2 470 citing *Hormel*, supra. In all of them new evidence was necessary. In the present case, no evidence was necessary, since the assertion figures appeared several times in the pleadings and findings.

20. An issue arises only where a material assertion in a petition or answer is met with opposition. At no time during the Rule 50 proceeding did the Commissioner oppose our claim that the asserted deficiencies and penalties appearing in the record should be accepted as just and legal debts which must be recognized as reductions or subtractions in computing net worth increases. *Stern Bros.* v. *Comm., and Estate of Esther Stein*, both *supra*. He had published his formal ruling acquiescing in the principle as established by those decisions, that later assertions of deficiencies and penalties are debts due on return-filing date in cases of fraud, as all other legal debts, to be subtracted from the assets.

21. Where intervening decisions have put a different face upon the litigation, although the points were not raised below, there is no doubt of the power to consider them. *Commissioner* v. *Brandegee*, (CCA-1); 23 F.2 58, 60-61. In addition to the Commissioner's intervening ruling, next above, see also *Dalbrough* v. *Commissioner* CCA-6 238 F.2 735. This is true particularly where, as here, no new or amplified factual determination is needed. *Black Motor Co.* v. *Commissioner* (CCA-6-125 F.2 977 citing *Scripps* v. *Commissioner* 96 F.2 492-496, where the issue was neither before the Board nor assigned before the appellate court.

22. *Peary-Byrnes Lumber Co.* v. *Commissioner* (CCA-5) 86 F.2 234, cited in the opinion below, has no analogy, since the mandate there directed specifically that a fixed *amount* be used to determine the liability and (on the second appeal) that the point raised below involved no mere matter of accounting but necessitated pleading amendment and new evidence.

23. Nor does *Helvering* v. *Kendrick Coal & Dock Co.* (CCA-8) 72 F.2 330, though cited, support the opinion below. In fact it supports petitioner here. There the mandate also was for further proceedings not inconsistent with the opinion. The Board (Tax court) heard no new evidence but made additional findings from the record. The Commissioner's position was, as here, the findings were not in conformity with the mandate. The appellate court ruled there was no disobedience but that the mandate clearly left the Board to perform completely a duty which had been imperfectly performed and the Board's new finding was contrary to the conclusive evidence. In our present case, no new fact finding and no new evidence were involved. See *Commissioner* v. *Ray supra.*

24. Judge Sobeloff is far afield in his holding that whether income is ascertained by the net worth computation or otherwise it is fundamental a taxpayer may not deduct from his annual taxable (*sic*) income his federal income tax and penalties. First, it is fundamental that the deductions in the statutes are from *gross income*. Second, neither income nor deductions in the statutory sense are a part of a net worth increase computation, and *Drybrough, supra* shows that neither accrual nor cash bases are so involved. The income determined by the method is a purely theoretical rather than a statutory or actual one, *Holland* v. *U. S. supra.* Third, no deduction for income taxes can be claimed unless they are paid. They were not here paid and it was so found as a fact. Fourth, the amounts were claimed as debts to be sub-

tracted in computing that "true financial status" (*Drybrough*) and "business and economic reality" (*C. C. Gunn* v. *Commissioner*, 247 F.2 359) which are the objectives of the net worth increase method.

(c) *The Tax Court's Decision as Affirmed is based upon error as to what the record showed.*

25. The Tax Court's order and decision (Ap. 5) is based in part on a misleading statement that there was an agreed computation of the tax following its first opinion,—indicating petitioner agreed it was correct. Under Rule 50, if there is agreement, such merely is that the computation is in accordance with the *then* opinion. But petitioner did not agree with the opinion, nor did the appellate court in part.

Later decisions and formal rulings altered the liability computation.

In any event, the first computation under the first Tax Court opinion had to be altered and a new computation made. Under 26 USC, sec. 7481 (3) (b) (4), this decision on the mandate was the only Tax Court final decision and the earlier decision and computation, in law, never had been rendered. To base this latest Tax Court decision and computation upon the first, never agreed to as the correct liability, was to rest upon what legally did not exist.

VIII. CONCLUSION

It is submitted respectfully that the decision of the United States Court of Appeals for the Fourth Judicial Circuit should be reviewed and, to such end, a writ of certiorari should be granted.

WARREN W. GRIMES,
640 Shoreham Building
Washington 5, D. C.,
Counsel for Petitioner.

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FIRST JUDGMENT AND MANDATE

On Petition to Review the Decision of the Tax Court of the United States.

This Cause came on to be heard on the transcript of the record from The Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the decision of the said The Tax Court of the United States, in this cause, be, and the same is hereby, modified as set forth in the opinion of the Court filed herein and, as so modified, it is affirmed; and that this cause be, and the same is hereby, remanded to The Tax Court of the United States for further proceedings not inconsistent with the opinion of the Court filed herein. May 27, 1957.

SIMON E. SOBELOFF
United States Circuit Judge.

RESPONDENT'S MOTION FOR ENTRY OF DECISION

Comes Now the Commissioner of Internal Revenue by his attorney, Nelson P. Rose, Chief Counsel, Internal Revenue Service, and pursuant to the opinion and mandate, issued in this case by the United States Court of Appeals for the Fourth Circuit shows the Court that the deficiencies and penalties found in its decision entered July 26, 1956, have been assessed under Section 7485, Internal Revenue Code of 1954, and have not been paid.

As indicated in the deficiency notice issued in this case on October 25, 1954, a copy of which is appended to the Petition as Exhibit A, the Commissioner allocated $821.84, part of the payment made on August 11, 1954 (Stip. of Facts Par. 2, filed December 12, 1955) to the fraud penalty for 1946. He also applied $10.00 of said payment

made prior to the issuance of the deficiency notice to accrued interest for 1946. As directed by the mandate the Court should find that there are now unpaid deficiencies in income tax and fraud penalties as follows:

Year	*Income Tax*	*Additions to Tax*
1942	$ 2,159.56	$ 1,079.78
1943	2,145.22	1,072.61
1944	15,745.65	7,872.83
1945	16,853.67	8,426.84
1946	3,613.85	12,887.27

s NELSON P. ROSE
NELSON P. ROSE.
Chief Counsel
Internal Revenue Service

DECISION OF TAX COURT

(Entered November 4, 1957)

Pursuant to the Mandate of the United States Court of Appeals for the Fourth Circuit, filed July 1, 1957, whereby the decision of this Court in this cause was modified and the motions for entry of decision filed by the respondent herein on October 31, 1957, it is

ORDERED: That the above entitled case, in so far as it purports to relate to Helen K. Romm, be dismissed as to her, and it is

ORDERED and DECIDED: That there are no deficiencies in income tax and additions to tax, or overpayments therefor, due from or to her for the taxable years 1942 to 1946, inclusive; and it is further

ORDERED and DECIDED: That there are now unpaid deficiencies in income tax and additions to the tax due from petitioner Joseph N. Romm, as follows:

Year	Income Tax	Additions to Tax
1942	$ 2,159.56	$ 1,079.78
1943	2,145.22	1,072.61
1944	15,745.65	7,872.83
1945	16,853.67	8,426.84
1946	3,613.85	12,887.27

JOHN E. MULRONEY,
Judge.

APPELLANT'S MOTION FOR STAY, HEARING, RECONSIDERATION AND LEAVE TO FILE UNDER RULE 50

Comes now Joseph N. Room, petitioner, by his attorney of record and respectfully moves for a stay of the judgment and decision of this Honorable Court entered November 4, 1957; for hearing and reconsideration thereof; and for leave to file counter-recomputation in disagreement thereto, under Rule 50 (b).

The reasons for this motion are that on October 29, 1957, the day the Supreme Court denied certiorari in this case, petitioner's counsel conferred with counsel for respondent and then was handed a rough draft of respondents proposed recomputation figures as to result only, but no recomputation upon which the same were based. Petitioner then stated he would disagree therewith, file his own recomputation and motion and discussed the legal reasons for such action. It then was orally agreed that such cross-computation would be prepared in detail and submitted to respondent with a letter brief in support thereof, both to be checked by respondent. Petitioner was occupied for several days upon the detailed recomputation and did submit the same to the respondent with the bases for showing that his proposed final figures were not "correct" as required by Rule 50. Nevertheless and without serving upon petitioner either a copy of his proposed motion for entry of judgment, motion for entry of

decision, proposed decision or any recomputation underlying them, respondent filed the same on October 31, 1957. The motions and proposed decision never were set down for a hearing or opposition and petitioner never given a reasonable opportunity to pursue the procedure prescribed in paragraph (b) of Rule 50—to petitioners substantial prejudice. Wherefore, petitioner asks that this motion be granted and the matter be set down for argument in accordance with Rule 50 (b).

/s/ WARREN W. GRIMES
Attorney for petitioner.

APPELLANT'S MOTION FOR ENTRY OF DECISION

Comes now the petitioner, Joseph N. Romm, by his attorney, Warren W. Grimes, and pursuant to the opinion and mandate issued in this case by the United States Court of Appeals for the Fourth Circuit, respectfully shows this Court that, under Rule 50 computation attached hereto, its decision should be entered for the following correct amounts:

Year	*Income Tax Deficiencies*	*Additions to the Tax*
1942	$ 2,159.56	$1,079.78
1943	707.95	353.98
1944	11,536.89	5,768.45
1945	1,500.43	750.22
1946	(13,088.81) Overpayment August 11, 1954	4,016.06

and that the amounts found by this Court in its decision entered July 26, 1956, having been assessed under Section 7485, I.R.C. for 1954, not having been paid, the assessment to be revised to conform hereto.

WARREN W. GRIMES
Attorney for Petitioner

ORDER VACATING TAX COURT DECISION AND SETTING HEARING

Upon consideration of motion of counsel for petitioners filed this date, the decision of this Court entered November 4, 1957, is hereby vacated and set aside, and it is further

ORDERED, That the petitioners' motion for entry of decision, with computation attached, be filed as of this date and that hearing on motions for entry of decision filed by both parties is set for Washington, D. C., at 10 A. M., December 11, 1957.

Entered November 20, 1957.

JOHN E. MULRONEY,
Judge.

ORDER AND DECISION APPEALED

Pursuant to Order of this Court dated November 20, 1957, hearing was had upon the motions of both parties for the entry of decision and at the conclusion of the hearing the matter was considered and the Court took the same under advisement.

It appears to the Court that what petitioner Joseph N. Romm is now seeking is a new Rule 50 computation based on an argument which raises new issues. The record shows the parties filed an agreed computation of the tax on July 24, 1956, after the Opinion of this Court, and the matter is now here on the Mandate of the United States Court of Appeals for the Fourth Circuit which commands, in part:

> It is now here ordered and adjudged by this Court that the decision of the said The Tax Court of the United States, in this cause, be, and the same is

hereby, modified as set forth in the opinion of the Court filed herein and, as so modified, it is affirmed;

• • •

The opinion of the Court of Appeals (Joseph N. Romm and Helen K. Romm, his wife, v. Commissioner of Internal Revenue, No. 7366, Decided May 27, 1957) shows quite clearly that the modification ordered was as to the allocation of a payment of $831.24 with respect to the 1946 deficiency and as to the liability of taxpayer's wife. This modification is reflected in respondent's computation accompanying his motion for decision, which computation we hold to be correct, and the following will be the

DECISION

Pursuant to the Mandate of the United States Court of Appeals for the Fourth Circuit, filed July 1, 1957, whereby the decision of this Court in this cause was modified and the motions for entry of decision filed by the respondent herein on October 31, 1957, it is

ORDERED: That the above entitled case, in so far as it purports to relate to Helen K. Romm, be dismissed as to her, and it is

ORDERED and DECIDED: That there are no deficiencies in income tax and additions to tax, or overpayments, therefor, due from or to her for the taxable years 1942 to 1946, inclusive; and it is further

ORDERED and DECIDED: That there are now unpaid deficiencies in income tax and addition to the tax due from petitioner Joseph N. Romm, as follows:

Year	*Income Tax*	*Additions to Tax*
1942	$ 2,159.56	$ 1,079.78
1943	2,145.22	1,072.61
1944	15,745.65	7,872.83
1945	16,853.67	8,426.84
1946	3,613.85	12,887.27

JOHN E. MULRONEY,
Judge.

Entered Dec. 17, 1957.

PETITION FOR REVIEW

To The Honorable, The Judges of the United States Court of Appeals for the Fourth Judicial Circuit:

JOSEPH N. ROMM hereby petitions the United States Court of Appeals for the Fourth Judicial Circuit to review the decision of The Tax Court of the United States entered on the 17th day of December, 1957, ordering and deciding that there are deficiencies in income taxes and additions thereto the same as follows:

1942	$2,159.56 deficiency	$1,079.78 addition
1943	2,145.22 deficiency	1,072.61 addition
1944	15,745.65 deficiency	7,872.83 addition
1945	16,853.67 deficiency	8,426.84 addition
1946	3,613.85 deficiency	12,887.27 addition

This petition is filed pursuant to the provisions of section 7482, Internal Revenue Code of 1954 (26 USCA sec. 7482).

The income tax returns involved were filed with the Collector (now District Director) of Internal Revenue, Baltimore, Maryland.

Joseph N. Romm

WARREN W. GRIMES
Shoreham Building, Washington 5, D. C.,
Attorney for petitioner on review.

DECISION PRESENTLY SOUGHT TO BE REVIEWED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

SOBELOFF, Chief Judge:

For the second time the parties to this case are before us on petition to review a decision of the Tax Court. The

sole question raised in the present proceeding is the scope of our mandate in the first.

Litigation between the taxpayer, Joseph N. Romm, and the Commissioner of Internal Revenue began after a deficiency assessment was made for the years 1942 through 1946. The Tax Court sustained the assessed deficiencies and fraud penalties. In our review a number of issues were presented, and as to all but two the Tax Court was affirmed. *Romm v. Commissioner of Internal Revenue*, 245 F.2d 730 (4 Cir., 1957). Among the contested procedures with which we found no fault was the manner in which the Tax Court had applied the net worth method of computing income. In our opinion we noted that the only challenge to the net worth computation was that certain assets in the name of the taxpayer's wife had improperly been included in the husband's net worth. We held that their inclusion was not improper.

In only two minor respects did we order the Tax Court to modify its decision. Since the taxpayer and his wife had not filed joint returns, we held that she was not liable for the deficiencies. We also found that interest had been erroneously computed.

In accordance with our mandate, the Tax Court, on November 4, 1957, entered a decision dismissing the case against Romm's wife, and recomputing the interest. Romm then moved to stay the Tax Court's judgment and requested leave to file counter-recomputation under Rule 50 of the Tax Court's Rules of Practice. Accordingly, Judge Mulroney of the Tax Court granted the taxpayer's request and set a hearing on the recomputations.

In his counter-recomputation, Romm arrived at an entirely new, and much lessened, tax liability. For the first time, he sought to reduce the annual increase in his net worth by the amount of deficiencies and penalties which had been subsequently asserted in respect to the several years involved.

The Tax Court rejected the counter-recomputation as raising new issues. It held that neither the mandate of this court nor Rule 50 would permit the belated injection of such new matter.

Romm's answer here is that he was not trying to raise "any new issues" within the meaning of the Tax Court's Rule 50, but that even if he was, the mandate of this court "compelled an entirely new decision," and that, therefore, the issue raised, even if new, should have been considered.

Our mandate was to the contrary of Romm's assertion, and the Tax Cour did not err. This is not a case in which on reversal a new hearing was directed. We ordered only that the decision of the Tax Court be "modified as set forth in the opinion of the court filed herein . . . ," and on all other matters the decision below was expressly affirmed. Judge Mulroney properly confined himself to the correction of the errors noted in the opinion, which was incorporated into our mandate. See: *Peary-Byrnes Lumber Co. v. Commissioner*, 86 F.2d 234 (5 cir., 1934); *Helvering v. Kendrick Coal & Dock Co.*, 72 F.2d 330 (8 cir., 1934).

We think *Polizzi v. Commissioner of Internal Revenue*, 247 F.2d 875 (6 cir., 1957), relied on by Romm, inapposite. Until computations under Rule 50 were filed in that case, the taxpayer was given no notice of the Commissioner's disapproval, as an insufficient joint return, of a return signed by the husband only, although it was clearly indicated on the face of the paper that it was intended to be a joint return. Because it was there considered that the Commissioner had misled the taxpayer by not putting him on notice earlier that the joint basis of computation was to be contested, the Sixth Circuit remanded the case for a new hearing and amendement of the pleadings.

Even if we should treat the present appeal as a motion to amend our mandate, Romm cannot prevail, for his basic claim is lacking in merit.

In the cases relied on by Romm, the courts held that, in determining the amount of corporate earnings and profits available for distribution as dividends, deficiencies and fraud penalties owing from the corporation to the government are to be subtracted from the earnings and profits. Cf. *Drybrough* v. *Commissioner of Internal Revenue*, 238 F.2d 735 (6 cir., 1956); *Stern Brothers & Co.*, 16 T.C. 295 (1951); *Estate of Esther M. Stein*, 25 T.C. 940 (1956). It was legal and proper to allow such an adjustment. Here credit is sought for Romm's own federal taxes and penalties, as a deduction from his annual increase in net worth. Whether income is ascertained by the net worth method of computation or otherwise, it is fundamental in our tax laws that a taxpayer may not deduct from his annual taxable income the amount of his federal tax or penalties; the Internal Revenue Code will not permit it. (1939 I.R.C., Sec. 23 (c) (1) (a), 26 U.S.C.A., Sec. 7482. Cf. *Holland* v. *United States*, 348 U.S. 121, 125 (1954).

Affirmed.